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9 Attorneys for Defendant,  
10 **LOWE'S HOME CENTERS, LLC**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

EFFIE VISSER

Plaintiff,

v.

LOWE'S HOME CENTERS, LLC, and  
DOES 1 TO 100,

Defendants.

Case No.:  
[Stanislaus County Superior Court Case  
No.: CV-22-001397]

**NOTICE OF REMOVAL OF ACTION  
UNDER 28 U.S.C. §1332 & §1441(B)  
(DIVERSITY) BY DEFENDANT  
LOWE'S HOME CENTERS, LLC**

Complaint Filed: April 1, 2022

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §1332 and §1441(b), Defendant LOWE'S HOME CENTERS, LLC, contemporaneously with the filing of this notice, is effecting the removal of the below referenced action from the Superior Court of the State of California for the County of Stanislaus, to the United States District Court, Eastern District of California. The removal is based, specifically, on the following grounds.

**JURISDICTION AND VENUE ARE PROPER**

1. This is a civil action over which this Court has original jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a), and is one which may be removed to this Court by Defendant pursuant to 28 U.S.C. § 1441(b) because it is a civil action between citizens of different states and the amount in controversy exceeds

1 \$75,000, exclusive of interest and costs, as set forth below. 28 U.S.C. §§ 1332,  
2 1441(a), and 1146(b).

## **PLEADINGS, PROCESS AND ORDERS**

6       3. On April 1, 2022, Plaintiff EFFIE VISSER (“Plaintiff) commenced the  
7 above-entitled civil action in the Superior Court for the County of Stanislaus by filing  
8 a Complaint therein entitled *Effie Visser v. Lowe’s Home Center, LLC and Does 1 to*  
9 *100*; Case No. CV-22-001397. True and correct copies of the following documents  
10 are attached hereto and incorporated herein by reference collectively as **Exhibit A**:

- a. Summons;
  - b. Complaint;
  - c. Notice of Errata;
  - c. Notice of Case Management Conference;
  - d. Blank Answer; and
  - e. Blank Case Management Conference Statement.

17       4.      On June 23, 2022, the documents comprising **Exhibit A** were personally  
18      served on defendant LOWE'S HOME CENTERS, LLC's agent for service of process.

19       5. On July 12, 2022, Defendant LOWE'S HOME CENTERS, LLC filed its  
20 Answer to Plaintiff's Complaint and Demand for Jury Trial. True and correct copies  
21 of Defendant LOWE'S HOME CENTERS, LLC's Answer to Complaint and Demand  
22 for Jury Trial are collectively attached hereto as **Exhibit B**.

23       6. On July 12, 2022, defendant LOWE'S HOME CENTERS, LLC filed a  
24 Stipulation to Strike Count from Plaintiff's Complaint; and [Proposed] Order. The  
25 state Court signed the Order on July 19, 2022, and it was entered by the Court on  
26 July 25, 2022. A true and correct copy of the Stipulation to Strike Count from  
27 Plaintiff's Complaint; and signed Order thereon is attached hereto as **Exhibit C**.

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7. The following documents are also on file with the Stanislaus County Superior Court:

a. Defendant's Case Management Statement, filed July 18, 2022, a true and correct conformed copy of which is attached hereto as **Exhibit D**.

b. Plaintiff's Case Management Statement, filed July 19, 2022, a true and correct copy of which is attached hereto as **Exhibit E**.

c. Proof of Electronic Service of Plaintiff's Case Management Statement, filed on July 19, 2022, a true and correct copy of which is attached hereto as **Exhibit F**.

c. Notice of Ruling Following Case Management Conference, filed August 2, 2022, a true and correct conformed copy of which is attached hereto as **Exhibit G.**

8. The attached exhibits constitute all process, pleadings and orders served by or upon Defendant LOWE'S HOME CENTERS, LLC in this matter.

## DIVERSITY

## A. Citizenship

9. This is a civil action over which this Court has original jurisdiction under 28 U.S.C. § 1332, in that it is a civil action wherein the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs. This action is one that may be removed to this Court by Defendant pursuant to 28 U.S.C. section 1441(b), as the action is between citizens of different states.

10. Plaintiff was, at the time of the filing of this action, and presently remains, a resident and citizen of the State of California.

11. Defendant LOWE'S HOME CENTERS, LLC, is a limited liability company. The citizenship of a limited liability company, for purposes of diversity jurisdiction, is the citizenship of its members. *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998); *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). LOWE'S HOME CENTERS, LLC, is a manager-managed

1 limited liability company with its only member being Lowe's Companies, Inc. Lowe's  
 2 Companies, Inc., is a North Carolina corporation, incorporated in North Carolina with  
 3 its principal place of business in the State of North Carolina. Accordingly, LOWE'S  
 4 HOME CENTERS, LLC is a citizen of the State of North Carolina.

5 12. Therefore, complete diversity of citizenship exists as between Plaintiff  
 6 EFFIE VISSER and Defendant LOWE'S HOME CENTERS, LLC.

7 **B. Fictitious Does**

8 13. Defendants DOES 1 to 100, inclusive, are wholly fictitious. The  
 9 Complaint does not set forth the identity or status of any said fictitious defendants. In  
 10 determining whether a civil action is removable on the basis of jurisdiction under  
 11 section 1332(a), the citizenship of defendants sued under fictitious names shall be  
 12 disregarded. 28 U.S.C §. 1441(b)(1); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686,  
 13 690-91 (9th Cir. 1998). Accordingly, the mere fact that the Complaint makes reference  
 14 to fictitious defendants does not destroy diversity jurisdiction and does not preclude  
 15 this action from being properly removed to this Court.

16 **AMOUNT IN CONTROVERSY**

17 14. Plaintiff's Complaint sets forth causes of action for negligence and  
 18 premises liability. *See, Exhibit A.* Plaintiff alleges that on April 23, 2020, she was a  
 19 patron at defendant's store and when she tripped and fell over a cable causing her to  
 20 be injured. Although Plaintiff was prohibited from stating a specific amount demanded  
 21 in her Complaint, Defendant has been able to ascertain through the Complaint and  
 22 "other paper" that the amount in controversy exceeds \$75,000.00.<sup>1</sup>

23 15. Where a complaint does not allege a specific amount in damages, the  
 24 removing defendant bears the burden of proving by a "preponderance of the evidence"  
 25 facts that support an inference that the amount in controversy exceeds the statutory  
 26 minimum. *Singer v. State Farm Mut. Auto Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1996);

27  
 28 <sup>1</sup> California Law prohibits personal injury plaintiffs from stating a specific amount of  
 damages sought in the complaint. *See, Cal. Code Civ. Proc. § 425.10.*

1 *see, McPhail v. Deere and Company*, 529 F.3d 947, 955 (10th Cir. 2008) (“It is only  
 2 the jurisdictional facts that must be proven by a preponderance – not the legal  
 3 conclusion that the statutory threshold amount is in controversy.”). This standard is  
 4 not a “daunting” one, as courts recognize that unlike the “legal certainty test”  
 5 applicable where the complaint does allege a specific amount in damages, the  
 6 removing defendant is not obligated to “research, state, and prove the plaintiff’s claim  
 7 for damages.” *McCraw v. Lyons*, 863 F. Supp. 430, 434 (W.D. Ky. 1994); *see also*,  
 8 *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1204-05 (E.D. Cal. 2008).

9       16. A defendant must merely set forth the underlying facts supporting an  
 10 inference that the amount in controversy exceeds the statutory minimum. A defendant  
 11 must establish jurisdiction by proving jurisdictional facts, i.e., proof of what the  
 12 plaintiff is seeking to recover. *McPhail*, 529 F.3d at 954-55. “Once the facts have  
 13 been established, uncertainty about whether the plaintiff can prove [h]is substantive  
 14 claim, and whether damages (if the plaintiff prevails on the merits) will exceed the  
 15 threshold, does not justify dismissal.” *Meridian Secs. Ins. Co. v. Sadowski*, 441 F.3d  
 16 540, 543 (7th Cir. 2006); *see also*, *McPhail*, 529 F.3d at 954 (once underlying  
 17 jurisdictional facts are proven, “a defendant (like a plaintiff) is entitled to stay in  
 18 federal court unless it is ‘legally certain’ that less than \$75,000 is at stake”).

19       17. On August 3, 2022 Plaintiff served Defendant by electronic service with  
 20 a Statement of Damages under California *Code of Civil Procedure* § 452.11, which  
 21 was received by Defendant on August 3, 2022. The Statement of Damages establishes  
 22 that the amount in controversy in this litigation exceeds the \$75,000 statutory  
 23 minimum. A true and correct copy of Plaintiff’s Statement of Damages is attached  
 24 hereto as **Exhibit H**.

25       18. Plaintiff’s Statement of Damages alleges that she is seeking in excess of  
 26 \$75,000 in past and future medical expenses, among other damages claimed. *Ibid.*  
 27 Thus, the amount in controversy exceeds the \$75,000 statutory minimum and federal  
 28 jurisdiction is proper.

19. 28 USC § 1446(b)(3) provides that, where the case stated by the initial  
2 pleading is not removable, a notice of removal can be filed within thirty (30) days after  
3 receipt by the defendant, through service or otherwise, of an amended pleading,  
4 motion, order “or other paper” from which it may first be ascertained that the case is  
5 one which is or has become removable. A statement of damages under California Code  
6 of Civil Procedure section 425.11, is a written statement setting forth the nature and  
7 amount of damages being sought, and constitutes “other paper” under section  
8 1446(b)(3). See *Hanson v. Equilon Enterprises LLC* (N.D.Cal. 2014) 2014 U.S. Dist.  
9 LEXIS 110795, \*9 (finding statement of damages served on defendant by plaintiff  
10 constituted “other paper”).

11       20. The test for whether the amount in controversy is satisfied is whether  
12 there is a “reasonable probability” that the claim exceeds \$75,000. *Scherer v. The*  
13 *Equitable Life Assurance Society of the U.S.*, 347 F.3d 394, 397 (2d. Cir. 2003). The  
14 Ninth Circuit has adopted the “either-viewpoint rule,” meaning that the amount in  
15 controversy requirement is satisfied if (1) Plaintiff seeks to recover more than  
16 \$75,000.00 or (2) the recovery Plaintiff seeks will cost the defendant more than the  
17 jurisdictional threshold. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 (9th  
18 Cir. 1996).

19       21. Plaintiff's Statement of Damages constitutes "other paper" and satisfies  
20 the amount in controversy requirement. Therefore, federal jurisdiction is proper.

## **TIMELINESS OF REMOVAL**

22        22. This Notice of Removal is timely filed in that it has been filed within  
23 thirty (30) days after receipt by Defendant of Plaintiff's Statement of Damages on  
24 August 3, 2022, which first indicated that the amount in controversy exceeds \$75,000  
25 and the matter is removable. 28 U.S.C. § 1446(b)(3).

26       23. Further, the instant removal is made within one year of the filing of the  
27 Complaint. As noted above, Plaintiff filed her Complaint on April 1, 2022.

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1       24. For the foregoing reasons, this Court has original jurisdiction under 28  
2 U.S.C. §§ 1332 and 1441(b).  
3

4 Dated: August 29, 2022

THARPE & HOWELL, LLP

5 By:   
6

7 STEPHANIE FORMAN  
8 ANDREA BREUER  
9 Attorneys for Defendant,  
10 LOWE'S HOME CENTERS, LLC

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THARPE & HOWELL, LLP  
15250 Ventura Boulevard, Ninth Floor  
Sherman Oaks, California 91403-3221

## PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service, I was at least 18 years of age and **not a party to this legal action.**
  2. My business address is 15250 Ventura Boulevard, Ninth Floor, Sherman Oaks, CA 91403.
  3. I served copies of the following documents (specify the exact title of each document served):

**NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. §1332 & §1441(B)  
(DIVERSITY) BY DEFENDANT LOWE'S HOME CENTERS, LLC**

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

Robert J. Anaya, Esq.  
LAW OFFICE OF ROBERT J. ANAYA  
821 13<sup>th</sup> Street, Suite E  
Modesto, CA 95354  
Tel: 209-522-7500  
Email: [robertanayaesq@aol.com](mailto:robertanayaesq@aol.com)

Attorneys for Plaintiff,  
**EFFIE VISSER**

- 5 a. **X** **BY ELECTRONIC TRANSMISSION.** By e-mailing the document(s) to the person(s) at the e-mail address(es) listed in item 4 pursuant to prior written consent of the party(ies) served. Fed.R.Civ.P. 5(b)(2)(E) and (F). I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

6 I served the documents by the means described in item 5 on (date): *See below*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/1/2022

Belinda A. Porras

DATE

**Belinda A. Flores**  
(TYPE OR PRINT NAME)

Belinda A. Porras

**(SIGNATURE OF DECLARANT)**